

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

9145
BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,944

INSURANCE COMPANY OF NORTH AMERICA,
Appellant,

v.

KATHLEEN HILL,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENNIS COLLINS
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United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 14 1967

Nathan J. Collins
CLERK

(i)

QUESTIONS PRESENTED

1. Whether a tenant whose actions prior to the occurrence of a negligently started fire in her leased premises have been found by the trial Court "to be part of the causal chain leading to this fire" can, in consideration of all the evidence, be then held not to be a concurrent tortfeasor as regards the damages due to this fire.

2. Whether the plaintiff carried its burden of proving, by a preponderance of the evidence, that the defendant engaged in a negligent course of conduct which was a proximate cause of a fire in her leased premises and the adjoining premises of plaintiff's subrogor causing damages amounting to \$19,379.73.

(iii)

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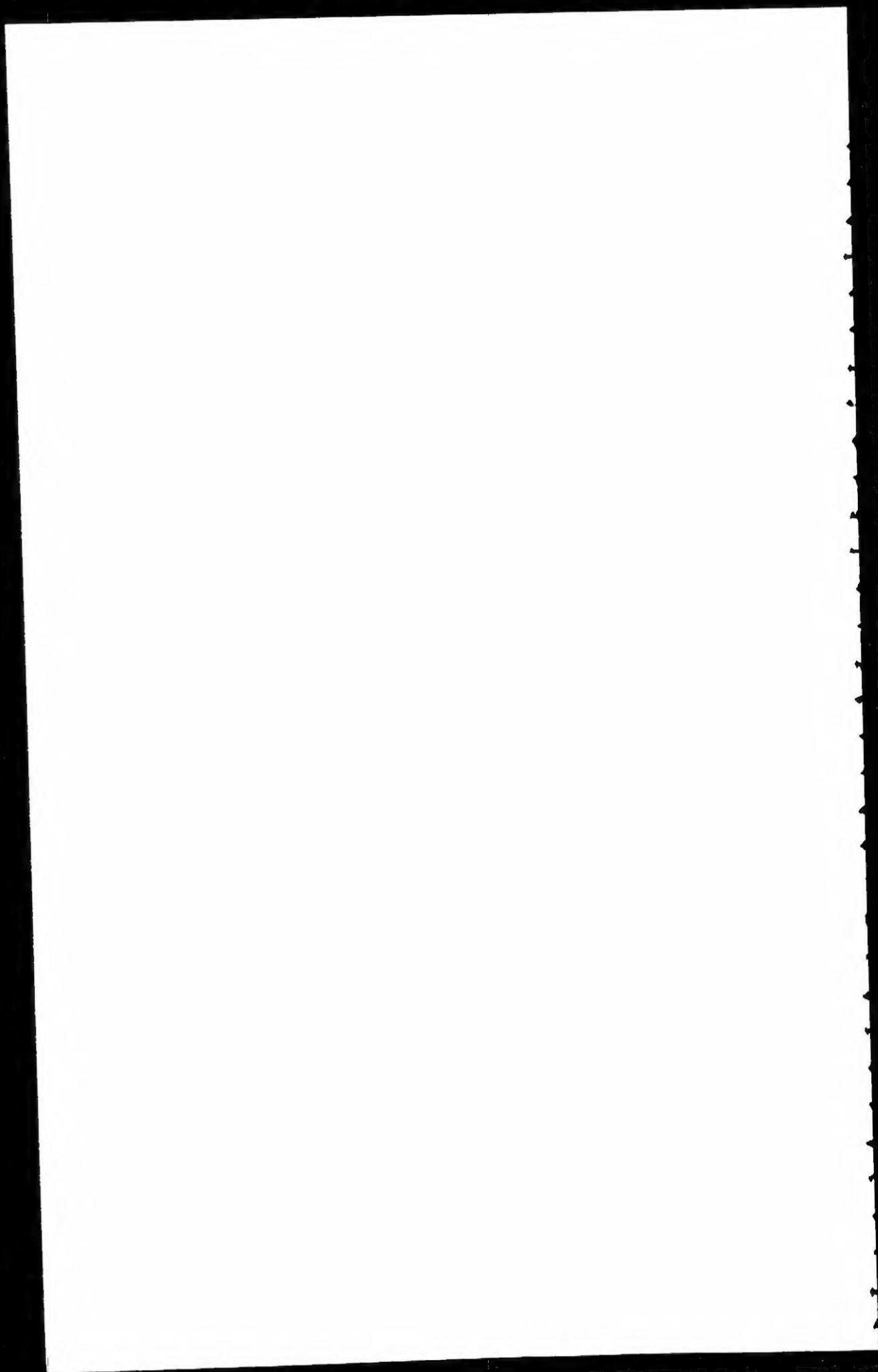
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. Jurisdiction is vested in this Court by virtue of 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

In the early morning hours of August 12, 1963 a fire occurred in the premises of the Dorchester House, an apartment building located at 2480 16th Street, N.W., in the District of Columbia. This fire caused extensive damage amount-

ing to \$19,379.73. That is the amount paid by appellant insurance company by reason of its contract of insurance with the owners of the said Dorchester House and appellant thereby became subrogated to the owners' rights to the extent of that payment.

The fire was found to have originated in Apartment 515, the sole tenant of which was appellee, Kathleen Hill. The cause of the fire was determined to be careless handling of a cigarette smoked by Mrs. Hill's social guest, one Owen Edmonds, which caused the living room sofa in appellee's apartment to ignite. (JA 3)

Mrs. Hill and Mr. Edmonds returned to her apartment, after having been partying and drinking alcoholic beverages for a period of ten to twelve hours, at a few minutes past 2:00 a.m., on August 12, 1963. Both of them were asleep on the sofa in her living room when they awoke to find the room filled with dense smoke from the fire less than forty-five minutes after they had entered the apartment. (Tr. 28, 34, 44, 45, 66, 90; JA 8, 9, 15, 16, 27)

Appellee had met Mr. Edmonds for the very first time at a "swimming party" around 2:00 p.m. on the afternoon of August 11, 1963. Neither of them did any swimming but both partook of the intoxicating liquors available to the extent of at least two or three drinks. The party then switched locale to a buffet-dinner party at the Red Coach Inn in Georgetown. In the interim Mrs. Hill had returned to her apartment to change clothes, a procedure taking about an hour and a half, and she arrived at the Red Coach Inn around 7:30 p.m. Mr. Edmonds was already there and again both had some drinks, "more than two or three." (Tr. 58, 59; JA 12, 13) In fact, appellee started to leave this party alone a couple of times and each time Mr. Edmonds persuaded her to stay for another drink. (Tr. 72; JA 18)

On arriving at her apartment, appellee invited Mr. Edmonds in for still another drink. When pressed to describe his condition at that time, Mrs. Hill refused to state whether or not Mr. Edmonds was intoxicated. When asked if he was under

the influence of alcohol, she stated: "Well, he had been drinking"; and further, "No. He couldn't be cold sober. He had been drinking." In pre-trial deposition when asked if he was showing some effects of having been drinking that day, she replied "Yes". He then removed his jacket and made himself comfortable on the sofa which both he and appellee were occupying when the fire was discovered, a short time later.

On the basis of these facts, appellant urges that appellee should have been found to be a concurrent tortfeasor with her guest in causing the fire damage of \$19,379.73 to this appellant.

SUMMARY OF ARGUMENT

Appellant, as a subrogee, has all the rights and duties of appellee's landlord, the Dorchester House. Appellee, as a tenant, had a clearly defined legal obligation to exercise reasonable care to protect the leased premises from damage of any kind. She had a particular obligation not to unnecessarily expose these premises to the risk of damage by fire.

Appellant contends that the findings of fact made by the trial court are amply supported by the evidence, but that it was error to then not conclude that appellee was negligent as a matter of law. What constitutes negligence as measured by that sometimes elusive standard of reasonable care is a question that can only be answered after a detailed examination of all the facts and circumstances of the particular case.

In this case, appellee's negligence combined with that of another concurrent tortfeasor to produce the injury to the appellant. Regardless of degree of culpability, any concurrent tortfeasor is liable at law just as if his negligence alone had caused the damage. The only real question is whether the injury to appellant's property could have occurred without negligence on appellee's part. Careful review of the record demonstrates clearly that it could not.

Negligence can be either active or passive, that is to say that it can be comprised of either committed acts or omitted acts or any combination of the two. If the conduct in its totality is wrongful and produces injury, the wrongdoer is liable. The facts found by the court describe three different points in time at which appellee failed to take reasonable precautions to prevent this damage. They show further that she had absolute control over the entire situation which gave rise to the fire damage, and that she steadfastly, if not purposefully, refused to make any reasonable exercise of that control. She failed to prevent an unreasonable risk from materializing, failed to properly evaluate the danger once it had materialized, and failed to take very simple steps available to her to prevent the risk from endangering the premises. In sum, her conduct fell well below that standard of due care which she owed to this appellant in safeguarding the property and she should be held liable for the full amount of damage which flowed from her conduct.

ARGUMENT

I

Appellee Owed to Appellant the Duty To Exercise Reasonable Care To Protect the Premises From Unnecessary Risk of Harm and From Damage by Fire

The starting point for every tort litigation must be an analysis of the exact relationship existing between the litigants and the rights and duties which the law has imposed on persons in that relationship. The case at bar involves a landlord and tenant relationship, and there is ample authority to clearly define the respective duties owed. Since we are concerned with a claim by the landlord against his tenant, we can limit the inquiry to an examination of the tenant's duties and whether or not this appellee breached any of those duties during the afternoon and evening of August 11th and the early morning hours of August 12, 1963.

The general rule has been well stated long ago by the United States Supreme Court in the case of *United States v. Bostwick*, 94 U.S. 53, 24 L.Ed. 65 (1877). The Court held that the landlord-tenant relationship obligates the tenant to exercise reasonable care to prevent damage to the property while he uses it and added that there is an implied covenant binding the tenant so to use the premises as not to injure them unnecessarily and so as to avoid the necessity for repairs, so far as possible. This duty has had a logical development in those particular cases which involve fires. Where it can be shown that the person controlling the property acted in such a way as to be part of the causal chain leading to the damage by fire, this person will be liable, notwithstanding that the fire may have resulted from the immediate act of a third party. If the owner or occupier is guilty of some negligence in respect of the condition of his premises or in failing to prevent the spread of a fire started on his premises by a third party, he will be liable for the ensuing damage. Similarly, a person who knowingly permits a careless person to occupy his premises can be liable for damage done by a fire accidentally started thereon by the latter's negligence. See 22 Am. Jur. *Fires* § 11.

There is, of course, no question, but that a lessee will be liable in damages to a landlord for damages done to the premises resulting from the lessee's own wrongful act or negligence. What must be kept in mind is that as regards fires, this negligence is found in merely unnecessarily exposing the premises to a risk. "Where a tenant brings upon the premises something which is likely to cause damage there-to unless proper precautions are taken to prevent it, he is liable for any injury resulting from his failure to take such precautions." 10 A.L.R.2d at 1016. Acts of a lessee which wrongfully expose the premises to an additional fire hazard can render him liable for injury by fire resulting therefrom. See Annot., 10 A.L.R.2d 1012.

Appellee's Conduct in the Hours Preceding the Fire Compel the Conclusion That She Failed To Exercise Due Care To Protect These Premises

The trial court found as fact that appellee had met Owen Edmonds for the very first time at a party approximately twelve hours before this fire occurred. Their relationship proceeded through two parties at which both of them were partaking of intoxicating liquor. The Court further found that on returning to appellee's apartment shortly after 2:00 a.m., she invited him in for another drink. Shortly thereafter (less than an hour), both awakened to find the room filled with dense, heavy smoke. The Court found that appellee does not smoke, that Mr. Edmonds did smoke, and that the fire was caused by his careless handling of a cigarette in the vicinity of appellee's living room sofa. (JA 3, 4) These findings are amply supported by competent evidence.

What is not supported is the Court's conclusion that Mrs. Hill was not negligent. In the factual background of this case, this conclusion is legally inconsistent with the Court's well-founded assertion that "... Defendant's actions during the early morning of August 12th may be said to be part of the causal chain leading to this fire. . ." (JA 5)

The only way in which appellee's conduct can be said to be part of the causal chain is in view of the facts that she should have known she was exposing the premises to a risk but she nevertheless failed or refused to exercise any control over that risk. In evaluating her conduct as gleaned from her testimony, it is not insignificant that the trial judged rejected Mrs. Hill's live testimony at every point where it conflicted with the testimony of Owen Edmonds which had to be offered by way of deposition.

The invitation to these two parties came from people totally unknown to her. All she knew about Owen Edmonds was that he was here from Texas on some kind of a business deal. Her observations of him at the "swimming" party were confined to noting that he smoked cigar-

ettes and drank liquor. At the later buffet-cocktail party, however, she became aware that he was interested in her and in more drinking. During cross-examination, she stated: "And I had started to leave a couple of times; and once I got in the cab and then he came out and persuaded me to go back in for, I guess, he said another drink, and which I did do." (Tr. 72; JA 18) Nevertheless, this was the man whom she allowed to escort her home and whom she then invited into her apartment for another drink. At this time, she described his condition as a person who had been drinking, was not cold sober and was terribly tired. (Tr. 63-64; JA 14, 15) Mr. Edmonds' recollection of these events is quite hazy (Tr. 87-90; JA 25-27), a circumstance, it is suggested, which is due to his condition at the time rather than the passage of time between the fire and the taking of his deposition.

A further important fact is shown in the statement made by appellee in the presence of Fire Inspector Johnson and Corporation Counsel King that at the time the fire was discovered, both she and her guest were occupying the very same living room sofa in which the fire originated (Tr. 34, 35, 44, 45; JA 8, 9) At the time this discovery was made, a matter of perhaps forty-five minutes after returning to the apartment, the room was already filled with dense, heavy smoke. (Tr. 66, 68, 87, 90; JA 15, 16, 26, 27) The position of these two individuals demonstrates quite clearly that appellee had every opportunity to completely control any negligent smoking by her guest. Her failure to do so and her inability to even notice the fire until the room was filled with thick, heavy smoke suggest quite strongly that she had impaired her own ability to be reasonably alert to protect these premises from danger.

The Court suggests that: "Cigarette smoking is so common a practice that special circumstances indicating a special hazard would have to be present reasonably to charge Defendant with the responsibility of preventing or watching her guests smoking otherwise she could rely on the presumption that others will act in a reasonable manner." (JA 5, 6) What more

special hazard could there be for a smoker than the combination of alcohol, alleged tiredness, and a soft sofa? The hazards of smoking in bed or while preparing to sleep are well known to all adults. Add in the factor of ten hours of drinking and the only reasonable conclusion is that appellee was or should have been on notice of a special risk of fire. What did she do about it? She added fuel to it. She offered another drink, permitted him to make himself comfortable on the sofa and even joined him there. Is it not crystal clear that but for her positive encouragement of this individual coupled with a failure to see or protect against the obvious danger, there would have been no fire in Apt. 515 of the Dorchester House that morning?

What are the determining standards? This Court made it plain in *McGettigan v. National Bank of Washington*, 115 U.S. App. D.C. 384 (1963) by stating: "Whether a defendant has acted as a reasonable man in the circumstances is said to depend upon whether his conduct — act or omissions — created an unreasonable risk of harm toward a plaintiff. . . . The ultimate question is whether defendant can fairly be said to be responsible for the injuries complained of." *Id.* at 386.

All the evidence is overwhelming that appellee should have been alerted to danger, that she should have known that this particular guest at this particular time and place was likely to smoke carelessly. You don't give matches to a child because a child is likely to use them carelessly and start a fire. Neither do you close your eyes to or even encourage a heavy smoker who has been partying for ten hours and professes "tiredness" to curl up on your sofa without bearing some responsibility for the consequences.

The net of this is that appellee was conducting herself in a manner which showed no recognition that she owed any duty to protect the premises from harm, but the obligation is immutable. She may not have been thinking of danger due to fire damage when she invited this particular guest to join her for a nightcap, but as between her and her landlord this was

negligent conduct. The damage to appellant could not have occurred without her negligent conduct, and she is liable regardless of whether the particular result of fire damage was foreseeable or not. *Hitafter v. Argonne*, 87 U.S. App. D.C. 57, 183 F.2d 811 (1950).

III

The Liability of a Joint Tortfeasor Is the Same as if He Had Acted Singly

When compared with the negligence of Mr. Edmonds, as determined in the findings of fact, there may be some tendency to excuse appellee herein, but the law very clearly does not allow any weighing of guilt. "If two or more acts of negligence concur to produce a single injury, one tortfeasor is not relieved of liability merely because his negligence was earlier in time. It may still be a proximate cause of the injury." *McGettigan v. National Bank of Washington*, *supra*, at 390 and authorities cited. The chain of negligent events begins with appellee. Just as in the *McGettigan* case where possible negligence was found to have originated with a property owner's failure to observe or control certain trespassers and their activities, here the chain begins with Mrs. Hill's inviting this man into her apartment and then providing added fuel and a setting for his incendiary negligence. While a property owner might choose to engage in such a risk at his peril, a tenant has the positive duty not to expose the leased premises to such a risk. Having done so, she cannot escape liability by blaming her guest. It is sufficient that her negligence constitutes a *contributing cause* of the damage. (Emphasis added) *Danzansky v. Zimbolist*, 70 U.S. App. D.C. 234, 105 F.2d 457 (1939).

CONCLUSION

Appellee herein had a special duty to protect the leased premises from unreasonable risk of harm. She was obliged to use her natural ability and intelligence to prevent dangerous situations from occurring, to observe them if they did come about, and to take reasonable steps to prevent the risks of danger from becoming actual damage. The evidence in the instant case compels the finding that she either abetted in creating a dangerous situation or she failed to observe a risk of danger or take reasonable steps to control it, all in violation of the duty owed a landlord by his tenant.

It is respectfully urged that the judgment of the District Court be reversed with instructions to enter judgment for the appellant in the amount of proven damages, namely \$19,397.73.

Respectfully submitted,

DENNIS COLLINS

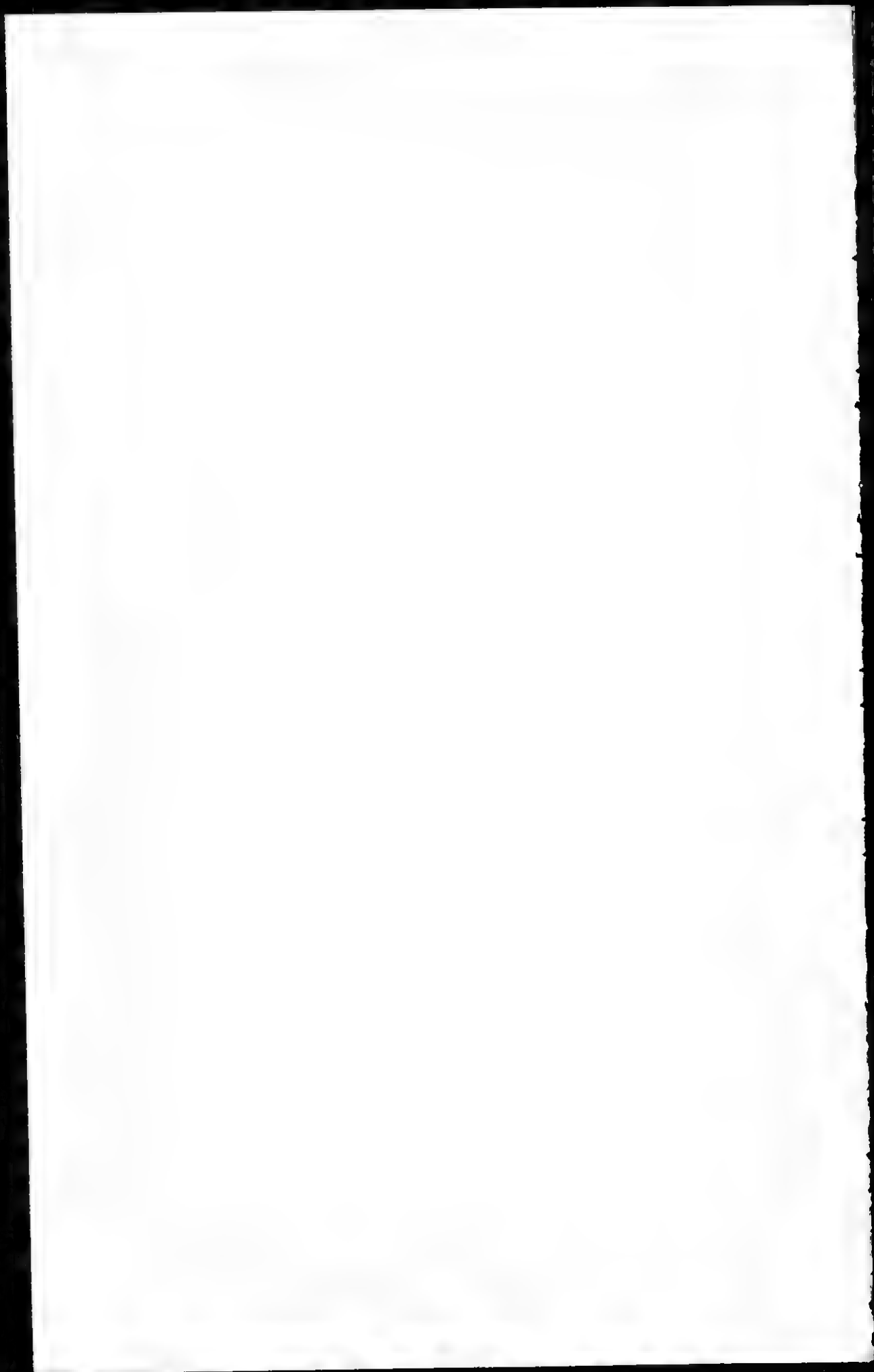
WILLIAM J. FITZGERALD

421 Shoreham Building
Washington, D.C. 20005

Attorneys for Appellant

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

INSURANCE COMPANY OF
NORTH AMERICA
a corporation
2133 Wisconsin Avenue, N.W.
Washington, D.C.

Plaintiff,

v.

KATHLEEN HILL
2500 Que Street, N.W.
Washington, D.C.

Defendant.

Civil Action No.
2494-64

COMPLAINT FOR DAMAGES
(Negligence – Property Damage)

1. The amount in controversy exceeds \$10,000.00 and is within the jurisdiction of this Court.
2. On or about August 12, 1963 defendant, while a tenant in Apartment No. 515 of the Dorchester House, 2480–16th Street, N.W., Washington, D.C., engaged in a negligent course of conduct which caused a fire at those premises with resulting damage to the building and its contents.
3. By reason of a policy of insurance between Messrs. Morris Gewirz, Alvin Ostrow and Ralph Cohen, owners of the Dorchester House, and the plaintiff-corporation, the latter was called upon to pay and has paid the sum of \$19,250.73 for the repair of the aforesaid damages and for the loss of rental income during the period of said repairs, and by virtue of said contract and the performance of same, the plaintiff-corporation became subrogated to this action in that amount.

WHEREFORE, Plaintiff demands judgment against the Defendant in the amount of \$19,250.73, plus the costs of this action.

Collins & Finney
By William J. Fitzgerald
Attorneys for Plaintiff

ANSWER TO COMPLAINT

Comes now the defendant, by and through her attorneys, in answer to the complaint filed herein against her, and states as follows:

1. Said Complaint fails to state a claim upon which relief can be granted.

2. Defendant admits that on or about August 12, 1963, a fire occurred in her apartment but denies all allegations of negligence on her part as causing the said fire.

3. Defendant has no knowledge as to the allegations of paragraph 3 of the Complaint and therefore denies the same and demands strict proof thereof.

4. Defendant denies any knowledge as to the cause of the fire as set forth in the Complaint, but alleges that if said fire were caused by negligence, then the negligence was that of a third party and not the Defendant.

WHEREFORE Defendant prays that the Complaint herein be dismissed.

Brick and Intrater
/s/ Samuel Intrater
Attorneys for Defendant

[Certificate of Service, dated December 2, 1964]

[Filed February 9, 1967]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Findings of Fact

1. On August 12, 1963, about 2:30 A.M., a fire broke out in the Dorchester House, a Washington, D.C., apartment building located at 2480 Sixteenth Street, N.W. The fire originated in Apartment 515, which was then rented to Defendant, Kathleen Hill. Plaintiff, Insurance Company of North America, the insurer of the building, is subrogated to the rights of the building owners and seeks to shift the nineteen thousand and three hundred and seventy-nine dollars and seventy-three cents (\$19,379.73) burden of fire, smoke and water loss to this Defendant.

2. The fire started shortly after Defendant and a guest had entered the apartment. Defendant had met her guest, Mr. Owen Edmonds, a Texas-based salesman in Washington on business, for the first time earlier the preceding day at a pool-side party. They had seen each other again that night at a buffet dinner-cocktail party. Mr. Edmonds had escorted Defendant home from that dinner and had been invited into Defendant's apartment for a nightcap. Both Defendant and Mr. Edmonds had been drinking at the two preceding parties.

3. Defendant does not smoke; Mr. Edmonds smokes cigarettes and was seen by Defendant smoking at the two parties. On entering the apartment some time after 2:00 A.M., Mr. Edmonds made himself at home, taking off his jacket and seating himself on the living room sofa while Defendant prepared the promised drinks. Soon afterwards, he fell asleep on the sofa. Defendant, who had returned to the living room, also fell asleep, soon after Mr. Edmonds did. At this time, a cigarette smoked by Mr. Edmonds caused the living room sofa, or something in its vicinity near the west wall of Defendant's apartment, to ignite. From this, the fire spread through the room. Defendant

was awakened by dense smoke; she opened a living room window to admit fresh air, aroused her guest, and the two ran into the building corridor where they banged on neighbors' doors to warn them of the fire. While so occupied, Defendant was overcome by the effects of the smoke, passed out, and was taken to the hospital.

Conclusions of Law

1. Plaintiff alleges that Defendant is a concurrent tortfeasor, i.e., one of two or more people each of whom by breaching differing respective duties owed to the plaintiff contributes to a single resulting harm. A concurrent tortfeasor is liable as if his negligence alone had caused the harm. See *Danzansky v. Zimbolist*, 70 App.D.C. 234, 105 F.2d 457 (1939), citing *Miller v. Union Pacific Railway Company*, 290 U.S. 227 (1933), *Railroad Company v. Hickey*, 5 App. D.C. 436.

2. Defendant is alleged to have been negligent in either (a) inviting a known smoker who had been drinking into her apartment at an early morning hour, or (b) having done so, in failing (1) to watch her guest carefully to prevent careless smoking on his part or (2) in failing to prevent her guest from smoking at all. Thus, by negligent act or omissions, or both, Defendant is said to have contributed to the cause of the fire.

3. The Supreme Court has stated that there is "... an implied obligation on the part of the lessee to so use the [leased] property as not, unnecessarily to injure it. . ." *United States v. Bostwick*, 94 U.S. 53, 65-66 (1877). [Note that here the question of Defendant's liability is not affected by the terms of any lease she might have entered into with the Dorchester House. Compare *Hardware Mutual Insurance Company of Minneapolis v. Snyder*, 137 F.Supp. 812 (S.D. Pa. 1956).] As to the alleged nonfeasance, "... the duty involved in controlling the conduct of human beings is at most the duty to exercise reasonable care for the prevention of harm to others." Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 888 (1934), see

Restatement, Torts § 302 A (1965). The Plaintiff is subrogated to the rights of the lessor, to whom Defendant owed both of these duties in relation to this incident. While Defendant's actions during the early morning of August 12th may be said to be part of the causal chain leading to this fire, the question of causation need not be answered unless it is determined that Defendant was negligent. On these facts, the determination of the question of negligence determines the case.

4. "In a legal sense negligence means nothing more or less than substandard care — want of that degree of care the law commands in the particular circumstances." *Richardson v. Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960), citing Harper & James, Torts 896 (1956). Further, "... in the District of Columbia, to govern the usual complex of ordinary relationships we apply the standard of ordinary care." *Kendall v. Gore Properties*, 98 U.S.App.D.C. 378, 236 F.2d 673 (1956). "'Ordinary care' means 'reasonable care' in the particular circumstances. The greater the hazard created by the acts or omissions of one charged with a duty, the greater is the duty to afford protection reasonable in the circumstances." *Foy v. Friedman*, 108 U.S.App. D.C. 176, 280 F.2d 724 (1960), citing Restatement, Torts, § 298 comment a (1934).

Plaintiff has not met his burden of proving by a preponderance of the evidence that, on these facts, Defendant was negligent, that her conduct on this occasion fell below the requisite standard of care. The use of an apartment to entertain guests, including cigarette smokers, is a common activity. Nor do the added factors that the invitee had been drinking earlier in the evening, as had his hostess, and that his visit occurred late at night take this particular invitation beyond the standard of conduct of an ordinary prudent person. Mrs. Hill's invitation can not reasonably be characterized as a negligent use of the rented property.

Similarly, Defendant was not negligent in failing to prevent or otherwise guard against careless smoking by her guest. Cigarette smoking is so common a practice that spe-

cial circumstances indicating a special hazard would have to be present reasonably to charge Defendant with the responsibility of preventing or watching her guest's smoking; otherwise, she could rely on the presumption that others will act in a reasonable manner. Restatement, Torts § 302A comment d (1965). It was established at trial that Mrs. Hill and Mr. Edmonds had met for the first time the day preceding the fire, and that Mrs. Hill had seen Mr. Edmonds smoking cigarettes prior to her inviting him into her apartment; Plaintiff did not prove that Mrs. Hill knew or should have known that her guest was careless with cigarettes. Plaintiff cites *McGertigan v. National Bank of Washington*, 115 U.S.App.D.C. 384, 320 F.2d 703, cert. denied, 375 U.S. 943 (1963), as an example of the standard of care which he feels Defendant breached. In fact, that opinion places a considerable emphasis on the element of foreknowledge in determining negligence. Here Defendant's status was that of an ordinary host entertaining an ordinary guest, and on these facts no part of her duty of ordinary care was to insure against Mr. Edmonds' careless smoking.

5. There is an additional factor. Defendant forfeited collateral in a proceeding brought against her under District of Columbia Police Regulation art. 37 (which makes the negligent causing of a fire a misdemeanor). The effect in a civil action of a violation of a regulation imposing a statutory duty has been summarized in *Whetzel v. Jess Fisher Management Company*, 108 U.S.App.D.C. 385, 282 F.2d 943 (1960). In this jurisdiction, those statutory duties which have been the basis for use of the "negligence per se" doctrine generally have been regulations setting out explicit standards of conduct, *i.e.*, keys shall not be left in the ignition of a parked automobile. However, the regulation here involved imposes no affirmative standard of conduct beyond an implied one of ordinary care; rather, it provides a penalty following a determination of negligence and causation. Therefore, the conviction of the misdemeanor is not relevant except as it might be considered persuasive on the question of negligence. See *Gould v. De Beve*, 117 U.S. App.D.C. 360, 362 n.2, 330 F.2d 826, 828 n.2 (1964).

JA 7

On these facts, the protection of the law does not extend to this Plaintiff. It is, therefore, this 9th day of February, 1967,

ORDERED by the Court that Judgment be and is hereby entered for Defendant in this cause.

/s/ Aubrey E. Robinson, Jr.
Judge

February 9, 1967

NOTICE OF APPEAL

Notice is hereby given this 2nd day of March, 1967, that the Plaintiff, Insurance Company of North America, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of February, 1967 in favor of the Defendant, Kathleen Hill against said Plaintiff.

Collins & Fitzgerald
Attorneys for Plaintiff

[Certificate of Service]

[Filed April 18, 1967]

EXCERPTS FROM PROCEEDINGS
[Washington, D.C.; December 20, 1966]

* * *

[15] BURTON W. JOHNSON

* * *

DIRECT EXAMINATION
BY MR. FITZGERALD:

* * *

[28] Q. Did you have occasion on the evening of the fire, Inspector Johnson, to interview anybody who was an occupant of that apartment at the time the fire was discovered? A. Yes, I did.

Q. Whom did you interview, sir? A. A Mr. Owen Edmonds and a Mrs. Kathleen Hill.

Q. And what statements, if any, did Mrs. Hill make to you at this time, sir. A. That she was asleep on the sofa in Apartment 515 with Mr. Edmonds and had been awakened and had awaked and found the apartment filled with smoke.

* * *

[34] Q. Now, subsequent to August 12th, 1963, Inspector Johnson, did you have any further conversation or meeting with Mrs. Hill relative to this fire? A. In the office of the Corporation Counsel at a later date, yes.

Q. And who was present at that time, sir? A. Mrs. Hill, Mr. Clark King, and counsel for Mrs. Hill.

Q. And what statement, if any, did she make relative to the fire, sir, at that time? A. That she did not smoke and did not know how the fire occurred.

Q. Did she make any statement as to the occupants of the apartment at that time, sir? A. That Mr. Edmonds was the occupant of the apartment with her, yes.

Q. Did she make any statement as to where they were in the apartment at the time the fire was discovered? A. That they were asleep on the sofa in the [35] apartment.

* * *

[43]

CLARK F. KING

* * *

DIRECT EXAMINATION
BY MR. FITZGERALD:

Q. Directing your attention, sir, to the fire which occurred at the Dorchester House on August 12, 1963 [44] did you at any time conduct a hearing relating to that fire, sir? A. Yes.

Q. And did the defendant here in court, Mrs. Kathleen Hill, appear before you in that connection, sir? A. She did.

Q. And do you recall approximately how long after the fire occurred that that took place? A. My best recollection would be a week or two.

Q. Can you tell us who else was present at the time, sir? A. The Fire Inspector and an attorney representing her.

Q. Now at that time, Mr. King, what statements, if any, did Mrs. Hill make as to how the fire was discovered and where she was at that time? A. As I recall, Mrs. Hill testified that she had met this gentleman, I don't recall his name, at a party or affair of some sort that evening and that he had brought her home, that they had had some drinks - I don't recall whether they had both at the party and at home or one or the other - but they had had some drinks, that they were occupying the sofa. As a matter of fact, she said that [45] both had fallen asleep and she was awakened and noticed the room was filled with smoke.

Q. All right. A. She did not have any knowledge, according to her, as to how the fire started.

* * *

[51] MR. FITZGERALD: Your Honor, at this time I would like to call the defendant, Kathleen Hill, as an adverse witness.

Thereupon.

KATHLEEN HILL

was called as a witness by the plaintiff and, being first [52] duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FITZGERALD:

Q. State your name, please. A. Kathleen Hill.

Q. Mrs. Hill, as of August 11th and 12th, 1963, you were a tenant in Apartment 515 in the Dorchester House, were you not? A. That is right.

Q. Do you recall what day of the week August 11, 1963, was, Mrs. Hill? A. A Saturday, I believe.

Q. The day of the week? A. Sunday, I believe.

Q. I believe it was Sunday. A. Yes.

Q. Now, on that Sunday, August 11, 1963, Mrs. Hill, was there anyone staying in your apartment with you from the previous Saturday night? A. No.

Q. You were the sole occupant all day on Sunday up until the time you returned late in the evening? A. Yes.

[53] Q. Now, did you attend a social engagement on that Sunday afternoon, Mrs. Hill? A. Yes.

Q. And where did that take place? A. At the Executive House.

Q. And what type of social affair was this? A. It was a swimming party.

Q. And by whom were you invited to this affair? A. By Miss Betty Lou Tagg.

Q. Was she a hostess or host for the party? A. No. She had just been invited the same as I.

Q. And at what time, approximately, did you arrive at the swimming party? A. Somewhere between two o'clock, three o'clock, something like that.

Q. In the afternoon? A. In the afternoon.

Q. Now, prior to that time, all Sunday morning, up until the time you left your apartment to go to that swimming party, had anybody else been in your apartment besides yourself? A. No.

Q. Now, did you meet Mr. Owen Edmonds at this [54] swimming party? A. Yes.

Q. Had you ever met him before? A. No.

Q. Do you know where he was from? A. I was told he was from Texas, Dallas, Texas.

Q. Did you know how he happened to be at that party?
A. I think he was the business associate of the host. I am not sure.

Q. Had you ever met the host before? A. No.

Q. Was Mr. Edmonds there at the time that you arrived?
A. No. He came in later.

Q. Can you tell us how much later? A. As well as I remember, anywhere from thirty minutes to an hour later.

Q. Now, were alcoholic beverages being served at the swimming party? A. Not at the swimming party. That was at the swimming pool and it was on a Sunday.

Q. I see. Were there alcoholic beverages available in [55] the host's apartment? A. Yes.

Q. Was this a situation where people might be going back and forth between those two places, either the swimming pool or back at the apartment? A. Yes.

Q. Did you yourself have anything to drink during the time that you were there? A. Yes.

Q. What were you drinking? A. Scotch.

Q. And how many drinks did you have? A. As well as I remember, two or three.

Q. Did you observe whether or not Mr. Edmonds was drinking at this time? A. I would say he was, yes.

Q. Could you tell us how many drinks he had? A. No.

Q. Could it have been more than two? A. I couldn't say.

Q. Did he usually have a drink when you observed him?
A. I beg your pardon.

[56] Q. Did he usually have a drink when you observed him? A. Well, I don't know.

Q. Do you know whether or not he was drinking liquor or what beverage he was drinking? A. It was liquor, but I don't know whether it was Scotch, Bourbon, or what.

Q. Do you know whether or not Mr. Edmonds did any swimming at this swimming party? A. No, he did not.

Q. Had you? A. No.

Q. You did not either? A. No.

Q. How long were you at the swimming party, Mrs. Hill?

A. Until about five-thirty, six o'clock.

Q. Where did you go from there? A. Back to my apartment.

Q. Now, did anybody accompany you back to your apartment? A. No.

Q. How long were you at your apartment? [57] A. About an hour and a half.

Q. Where did you proceed from there? A. To a restaurant called Red Coach Inn.

Q. That is in the Georgetown area? A. Yes, on M Street in Georgetown.

Q. During the time that you were in your apartment before leaving for the Red Coach Inn, was anybody else in your apartment besides yourself? A. No.

Q. And did you again meet Mr. Edmonds at the Red Coach Inn? A. Yes, he was there.

Q. Was it pretty much in the same crowd? A. A good many more people.

Q. More people? A. Yes.

Q. Was it the same host? A. Yes.

Q. What type of party was this at the Red Coach Inn, if I may call it a party? A. It was a private party. The restaurant was closed to the public, and this was a private party of the host. It was his party.

[58] Q. Was this a sit-down dinner party or a buffet type or just a cocktail party? A. It was buffet type.

Q. It was not an occasion when everybody sat down and were served dinner then? A. No, you served yourself.

Q. And alcoholic beverages were freely available at this party? A. Yes.

Q. And, again, did you have anything to drink? A. Yes.

Q. Scotch again? A. Yes.

Q. And can you tell us how many drinks you had while you were there? A. No, not during the whole course of the evening, I couldn't say exactly.

Q. How long did you stay at the Red Coach Inn? A. Left around two in the morning.

Q. And you had arrived there at what time? A. About seven-thirty, eight o'clock.

Q. Would it be fair to say that you had more than two or three drinks on this occasion? [59] A. Yes.

Q. And did you observe whether or not Mr. Edmonds was drinking at this time? A. Yes, he was drinking.

Q. Could you tell us how much he had to drink? A. No.

* * *

[60] Q. Was Mr. Edmonds at the Red Coach Inn at the time you arrived there, Mrs. Hill? A. I can't remember whether he was there or came after I did. I can't remember.

[61] Q. Can you tell us whether he would have been there shortly after you arrived if he was not there when you arrived? A. It was shortly after.

Q. And was he there up until the end of the evening? A. Yes.

Q. And were you in his company frequently during that evening, this seven hours that we are discussing? A. Well, I wasn't exactly what you would call with him. He was there and in the crowd, the group, and I talked with other people. I just wasn't with him.

Q. In other words, people were circulating and you were in the group and during most of the time were you not able to see Mr. Edmonds or be aware that he was nearby? A. Yes.

Q. And have an opportunity to observe him? A. Yes.

BY THE COURT:

Q. Did you sit down at any time to eat buffet? A. Yes.

Q. Did you sit at tables? A. Yes, sir.

[62] Q. Was there more than one table in the restaurant? A. Yes, sir.

Q. There were several tables. Was Mr. Edmonds ever

seated at the same table with you? A. That I can't remember either, sir. He may have been.

Q. But he did not have dinner with you? A. No.

Q. Do you remember whether he did or not? A. I don't remember whether he did or not.

Q. And after dinner, did you remain seated at the tables for the rest of the evening or were the tables taken away? A. Well, the tables were not taken away, but we were milling around, walking around, talking.

THE COURT: All right. Thank you.

BY MR. FITZGERALD:

Q. Do you know in fact, Mrs. Hill, whether or not Mr. Edmonds ate dinner at all this evening? A. I do not know that, no, sir.

Q. Did you? A. Yes.

Q. Now, at about what time, Mrs. Hill, did you [63] leave the Red Coach Inn? A. As well as I remember around two o'clock in the morning.

Q. And with whom did you leave? A. With Mr. Edmonds.

Q. And what mode of transportation did you use upon leaving? A. Taxi.

Q. And where did you go from there? A. To my apartment.

Q. And was there anybody else in the cab besides Mr. Edmonds and yourself, any other passengers? A. No.

Q. Did you make any stop anywhere from the Red Coach Inn to your apartment? A. No.

Q. And at what time did you arrive at your apartment? A. Again, as well as I remember, around two, two-fifteen, something like that. It was in the neighborhood of two o'clock.

Q. Was Mr. Edmonds intoxicated at that time, Mrs. Hill? A. Well, what do you mean by intoxicated?

[64] Q. Was he under the influence of alcohol? A. Well, he had been drinking.

Q. You would not say he was cold sober? A. No. He couldn't be cold sober. He had been drinking.

Q. How did he show the effects of having been drinking that you observed? A. Well, he was terribly tired, but he

said it was because he had been travelling all night, and had not had any sleep. So he was very tired.

Q. And did you invite him into your apartment? A. He came in, yes.

Q. He didn't force his way in, did he? A. No, sir.

Q. Your apartment is on the fifth floor of the Dorchester House? A. Yes.

Q. You and he entered the lobby and had gone up the elevator? A. Did we?

Q. Yes. A. Yes.

Q. About how far is the elevator from the fifth floor [65] apartment, Mrs. Hill, your apartment? A. It is quite a long corridor, about as long, longer than this room here.

Q. During the afternoon and evening, Mrs. Hill, had you occasion to observe whether or not Mr. Edmonds was smoking? A. Yes.

Q. And what did you observe in that regard? A. Cigarettes.

Q. He was a smoker of cigarettes? A. Yes.

Q. Could you tell us whether you observed him to be a heavy smoker or not? A. No, I could not say.

Q. When did you discover the fire in your apartment, Mrs. Hill? A. You mean, about what time?

Q. Yes. A. Around 2:30, 2:45, something like that, something about 3:00 o'clock.

Q. And how did it come to your attention? A. Well, I fell asleep and I was awakened by the smell of smoke.

[66] Q. And what was the condition of the smoke in your apartment at that time? A. Very dense smoke.

Q. Very dense smoke? A. Yes.

Q. Where were you in the apartment at the time that you were awakened? A. I was sitting in a chair.

Q. Was Mr. Edmonds in the apartment at the time? A. Yes.

Q. Where was he? A. He was on the sofa.

Q. How far is the sofa from the chair? A. About twelve feet across the room.

Q. What did you do, Mrs. Hill, from the time that you

entered your apartment until the time that you fell asleep?

A. Just sat there and talked for a little while, and then Mr. Edmonds fell asleep and so did I.

Q. Did you see him fall asleep? Was he asleep before you? A. Yes.

Q. And where was he at that time? [67] A. He was sitting on the sofa.

Q. Was he smoking at that time? A. I can't remember that.

Q. Had he been smoking at any time after entering your apartment? A. I can't say that for sure either.

Q. Was he reclining on the sofa or sitting with his head back or what? A. He was sitting with his head back.

Q. I am talking about the time you last saw him before discovering the fire. A. He was sitting with his head back.

Q. And in what position was he or where was he when you discovered the fire? A. He was on the sofa with his head back, and then he was lying down on the sofa.

Q. Fully stretched out on the sofa? A. Yes.

Q. During the time that you observed him while he was in your apartment, had he taken off his jacket or removed any articles of clothing? A. Not that I can recall.

Q. Did he still have his jacket on at the time you [68] discovered the fire? A. I can't remember that.

Q. What did you do upon being awakened by the smoke, Mrs. Hill? A. Well, I opened the window to get some air.

Q. And what then? A. And then I turned back into the room; and by this time the smoke was so dense and so strong that I couldn't see; and I went over to the sofa to get Mr. Edmonds up.

Q. Did you have any difficulty in arousing him at this time? A. A little, yes.

Q. And what did you then do? A. We opened the door and went out the hallway; and Mr. Edmonds suggested about the same time I did, I suppose, to arouse the other people in the other apartments.

Q. Did you leave the door to your apartment open? A. As well as I remember.

MR. FITZGERALD: Would Your Honor indulge me just a minute?

THE COURT: Surely.

BY MR. FITZGERALD:

Q. Mrs. Hill, where was the nearest fire alarm to [69] your apartment at the Dorchester House at that time? A. If I recall, I think there was one on the same floor, on the same floor.

Q. Was it in the same corridor wing as that in which your apartment is located? A. I can't say for sure.

Q. Did you make any effort to find the fire alarm at this time? A. No.

Q. Did you ever notify the Fire Department in any way or make any call about this fire? A. No.

* * *

MR. FITZGERALD: That is all I have at this time.

CROSS EXAMINATION

BY MR. INTRATER:

Q. Mrs. Hill, you stated that you and Mr. Edmonds decided to attempt to arouse the other tenants on that floor? A. Yes.

Q. How did you go about doing that? A. By rapping on the door and knocking on the door.

Q. Were you each rapping on the same doors or did you [70] take different doors to go to? A. Different doors.

Q. How long did you continue rapping on the doors? A. It was a matter of minutes, just, you know, as long as it would take someone to be aroused out of sleep and come to the door.

Q. When somebody came to the door, what did you tell them? A. That the place was on fire.

Q. And then did you go to another apartment after that? A. Yes.

Q. Do you recall approximately how long you continued in this process of knocking on doors and arousing people? A. Well, where my apartment is situated, one, two, three four doors is all that I can remember knocking on which

was right around my apartment; and by this time, other people began to come out from doors.

Q. So that by this time people were getting aroused whether or not you knocked on their particular apartment or not? A. That is right.

Q. And what did you do after that? [71] A. Well, it is not too clear, because the next thing I remember I woke up in a hospital.

Q. Do you recall the firemen coming before you left the place? A. No.

Q. Do you recall seeing any firemen between the time you were knocking on doors and the time when you woke up in the hospital? A. No.

Q. Do you remember anything between the incident of knocking on doors and waking up in the hospital? A. No. I remember knocking on doors, and then I can't remember whether I passed out in the same hallway or whether I got down to the lobby or not; but I remember a lot of people, and then I looked back and the hallway was full of smoke.

Q. Do you recall being conscious when you were down on the first floor? A. I can't recall to say for sure. It seems that I did make it to the lobby, but I am not sure.

Q. Now, at the Red Coach Inn, was Mr. Edmonds your companion there or was he one of the various people that were around there? I would like to know exactly [72] what the circumstances were. A. He was just someone there. And I had started to leave a couple of times; and once I got in the cab and then he came out and persuaded me to go back in for, I guess, he said another drink, and which I did do; but while in the Red Coach Inn he was just there.

Q. Now, would you describe the circumstances under which he accompanied you back to your apartment? A. Well, when he got ready to leave, he asked could he take me home. And I said yes. And we got in the cab and went home.

Q. When he came up to your apartment, was he staggering or in need of support in any way? A. No.

Q. You didn't help him up in any way? A. No.

Q. How about getting in and out of the cab, did you have to help him get in and out of the cab? A. No.

Q. Was his speech blurred or confused that you could observe from the use of alcohol? A. No, it wasn't.

Q. In short, when you said before that he was not [73] cold sober, was this an observation because you knew he had been drinking? A. Because he had some drinks, yes.

Q. Did you observe anything specifically about his conduct, such as staggering or anything else, that would indicate that he was intoxicated? A. No, except, as I said, he was very tired, but he wasn't staggering. He fell asleep immediately when we got into the apartment.

Q. When he was in the apartment, did you do or say anything to try to get him to leave? A. Yes.

Q. Do you recall exactly what you did or what you said? A. Well, I told him it was late and that I would like to go to bed, and he said, "We will just sit down for a minute." And the next minute he was asleep. And I waited for him to get up or be able to get up from sleeping, and I fell asleep myself.

MR. INTRATER: I have no further questions.

REDIRECT EXAMINATION

BY MR. FITZGERALD:

Q. After he fell asleep, Mrs. Hill, did you make [74] any effort to awaken him and get him out? A. Yes.

Q. And you could not awaken him at that time? A. No.

Q. This was almost immediately after he had entered the apartment? A. Yes.

MR. FITZGERALD: That is all.

THE COURT: I have a couple of questions.

BY THE COURT:

Q. Before you left the apartment, Mrs. Hill, were you able to tell what was on fire? A. No, sir.

Q. You saw no flames? A. I saw no flames.

Q. Just the smoke? A. Yes, sir.

Q. Were there any lights on at that time in the apartment?

A. Yes, sir.

Q. And immediately after you opened the window, you saw no flames after that? A. No, sir.

[75] Q. You saw no flames in your apartment at any time? A. I saw no flames at all.

Q. And against which wall in your apartment was your sofa located? A. On the right-hand side of the west wall, I believe, right-hand side going into the apartment.

THE COURT: Thank you.

(The witness resumed her seat at the counsel table.)

THE COURT: You may proceed.

MR. FITZGERALD: At this time, Your Honor, I would like to put into the record certain portions of the deposition of Mr. Owen Edmonds. This was taken in Texas, of course, and I believe there is a copy of it in the court file. I have attempted to eliminate those matters which I don't feel are pertinent; and, of course, Mr. Intrater can put in what he feels is pertinent.

* * *

[76] MR. FITZGERALD:

[77] "Question. All right. During the month of August, 1963, state whether or not you had occasion to be in Washington, D.C.?"

"Answer. I was? I did.

"Question. Do you remember approximately when this was?"

"Answer. I can only say that it was during—I was in Washington sometime during that summer or fall and August would seem to be reasonable.

[78] "Question. What was your work for being in Washington, D.C., at this particular time?"

"Answer. I had been asked to join or come with some of the principals of C.F.C., who were trying to negotiate or establish or carry through a financial transaction.

"Question. How did you travel to Washington, D.C.?"

"Answer. I flew.

"Question. By commercial airline or private?"

"Answer. By commercial.

"Question. Who paid for your transportation?"

"Answer. C.F.C."

I think we can skip over then to page 9, line 11.

"Question. What did you do while you were in Washington, D.C., on this particular occasion?"

"Answer. I attended some conferences and I attended a social gathering, and to the best of my recollection, that is all."

On page 10 at line 4:

"Question. Now, you say that you attended a social gathering?"

"Answer. Yes.

"Question. Was this one or more than one?

"Answer. This was one, starting in the early [79] evening.

"Question. What was the nature of the social gathering?

"Answer. It was a number of invited people at a party.

"Question. Do you remember the –

"Answer. And I – excuse me.

"Question. Do you remember the day or the week that this social gathering was held on?

"Answer. I don't presently remember the day of the week, but based on – could I go off the record just a minute?

"Question. No; but go ahead and just ask the question: maybe we can help you.

"Answer. If you would rephrase your question – I can only base it on the date you told me.

"Question. All right. Are you familiar with the fact there was a fire?

"Answer. Yes.

"Question. In the early morning hours of the day that you were in Washington, is that correct?

"Answer. Yes.

"Question. If the facts would establish that [80] this fire occurred at about 2:30 A.M. on August 12th, 1963, and that 2:30 A.M. on August 12th, 1963, was a Monday, would that assist you in any way in determining when this social gathering was held?

"Answer. The previous Sunday evening.

"Question. Then August 11th, 1963, is that correct?

"Answer. Correct.

"Question. Now, do you remember where this social gathering was held?

"Answer. Not by name; it was a restaurant.

"Question. When did this party commence?

"Answer. In the early evening hours.

"Question. Now, by that did you mean 5:00 or 6:00 in the evening, or earlier than that?

"Answer. I mean in that area; 5:00 to 7:00.

"Question. Would the name of Red Coach Inn be of any assistance to you?

"Answer. That is correct.

"Question. Is that the place where the party was held?

"Answer. To the best of my knowledge, yes."

I think we can skip over to page 12, line 22.

[81] "Question. Was this party or gathering an open house or a party where everyone came at approximately the same time and left at the same time approximately?

"Answer. I would say nearer an open house as contrary to the alternate.

"Question. Rather than a formal dinner party type arrangement?

"Answer. That's right.

"Question. In the nature of a cocktail party, then?

"Answer. Right."

Down to line 15.

"Question. Did you accompany anyone to the party?

"Answer. No, not to my knowledge.

"Question. Approximately how long did you remain at the party?

"Answer. Approximately six hours.

"Question. What time would that cause you to be leaving the party?

"Answer. Well, I am assuming I arrived at six and I am assuming I left at closing. I do not know Washington laws, when closing was.

[82] "Question. You left when they closed up?

"Answer. Yes, that's right.

"Question. Did you have anything to drink at this party?

"Answer. Yes, I did.

"Question. Do you recall what you were drinking?

"Answer. No, I don't.

"Question. All right.

"Answer. Highballs of some nature.

"Question. Highballs?

"Answer. Yes, but whether it would be a scotch and water or bourbon and water, I don't know.

"Question. Other than a highball, did you have anything else?

"Answer. Not that I can remember. It was quite a while ago.

"Question. Do you remember what, if anything, you had to eat at the party?

"Answer. No, I don't remember what the food was I ate.

"Question. Was there any entertainment or an orchestra to dance, or was this more of a cocktail party type?

"Answer. I don't remember any entertainment.

"Question. When did you —

[83] "Answer. But there may have been — they may have had a juke-box or something; I frankly don't remember.

"Question. When you did leave the party there where did you go then?

"Answer. I took Mrs. Hill home.

"Question. That is Mrs. Kathleen Hill?

"Answer. Right.

"Question. Was she a friend or acquaintance of yours?

"Answer. No, sir.

"Question. Where did you meet her?

"Answer. At the party.

"Question. And you have not known her before, is that correct?

"Answer. That is correct.

"Question. Had Mrs. Hill, to your knowledge, been drinking at the party?

"Answer. I cannot specifically say 'yes'; I would assume that everybody did, but I do not know specifically.

"Question. When she left, was there anything unusual about her nature that would lead you to believe that she had or had not been drinking?

[84] "Answer. No, sir.

"Question. Did she seem to be to you to be under the influence of alcohol?

"Answer. I was not impressed with that at the time.

"Question. At the time you left were you, in your opinion, under the influence of alcohol?

"Answer. I was not impressed with that at that time.

"Question. You would not be able to make a statement one way or the other?"

"Answer. That is correct.

"Question. At this time?"

"Answer. That is right.

"Question. As to what your condition was when you left?"

"Answer. That is correct.

"Question. I notice you are smoking a cigarette today. Do you smoke regularly?"

"Answer. Yes, sir.

"Question. And you were smoking in August, 1963?"

"Answer. I would presume so, yes.

[85] "Question. Do you smoke anything other than cigarettes?"

"Answer. No, sir.

"Question. In August, 1963, what was your approximate cigarette consumption if you remember?"

"Answer. I would estimate about a pack and a half a day.

"Question. About a pack and a half a day?"

"Answer. That's right.

"Question. Was Mrs. Hill smoking at this time, to your knowledge?"

"Answer. I don't know.

"Question. Whether or not she was you would not be able to say?"

"Answer. That is correct.

"Question. How did you leave from the place where the party was held?"

"Answer. I don't remember that specifically; I would assume we took a taxi, but I do not know.

"Question. Where did you go?"

"Answer. To wherever Mrs. Hill lived.

"Question. Do you know where that is?"

"Answer. No, I don't. I am not familiar with [86] Washington.

"Question. Does the name Dorchester House sound familiar to you?"

"Answer. I couldn't positively say. There are Dorchester Houses in so many cities.

"Question. Was it a home or apartment?

"Answer. It was an apartment.

"Question. And do you remember whether or not you stayed on the ground floor or went up?

"Answer. Went up is all I can tell you.

"Question. You went up?

"Answer. I don't know what floor.

"Question. Was there anyone else with you and Mrs. Hill on this occasion?

"Answer. Not when we entered her residence. Whether or not we took a cab home alone or whether anyone dropped us off, I don't know, so far as that.

"Question. Do you remember approximately when you did arrive with Mrs. Hill at her apartment?

"Answer. No, I don't, except that it could — I would assume it would be pinned down by checking whatever distance that is from the restaurant, presuming the restaurant had a closing time or Washington does.

[87] "Question. You didn't make any stops?

"Answer. No.

"Question. On the way?

"Answer. No, sir.

"Question. Do you remember anyone coming to Mrs. Hill's apartment at any time after you left there?

"Answer: No, sir.

"Question. Now, after you arrived what, if anything occurred after you went into Mrs. Hill's apartment?

"Answer. Mrs. Hill invited me in for a good night drink.

"Question. Did you all have a drink?

"Answer. I remember that she prepared it, or went to prepare it. I don't remember, frankly, whether I consumed it or not.

"Question. I see. Do you remember whether or not Mrs. Hill was smoking at this particular time?

"Answer. I can't say.

"Question. What next happened after you remember Mrs. Hill going to prepare the drinks?

"Answer. The next thing I remember is that I awakened to very heavy smoke.

"Question. Where were you at this time?

[88] "Answer. I can't say that; I don't know; I was in the living room. I presently just remember smoke and getting up and dashing out.

"Question. You don't remember what you were sitting on or laying when you realized there was smoke?

"Answer. No, I don't.

"Question. When you saw Mrs. Hill go to get the drinks, were you standing up or sitting down, or do you remember?

"Answer. I honestly don't remember.

"Question. And so where you were from this time til the time that the smoke aroused you you would not be able to say, is that right?

"Answer. That is correct. Actually, I presume we were standing up when she went to get the drinks.

"Question. Would you be able to say whether you went to sleep or passed out or what it was that caused you to have this memory lapse at the time?

"Answer. I was certainly asleep.

"Question. All right.

"Answer. I would think I dozed off.

"Question. Do you know about what time it was you were awakened by this smoke?

[89] "Answer. No, sir, except that it was early morning. Not specifically what time, no.

"Question. You wouldn't be able to express an opinion as to how long you were in her apartment?

"Answer. No, sir, I wouldn't.

"Question. Where was Mrs. Hill when you were awakened by this smoke?

"Answer. I don't know that.

"Question. Do you -

"Answer. (continuing) I don't know if I woke up or if she

woke up or I awakened her or she awakened me: I don't know.

"Question. Do you remember what room of her apartment it was?

"Answer. No, sir; I was in the living room, because that was as far as I ever got.

"Question. Do you remember whether or not she was in the living room or another room?

"Answer. Well, she went to the kitchen, I presume, to fix the drinks, but I frankly don't remember.

"Question. Where she woke up you cannot remember?

"Answer. We were together in the living room; I [90] don't know where she was —

"Question. Well, did you —

"Answer (continuing) You wake up in a panic and you head for the door.

"Question. Where is your first memory of seeing Mrs. Hill after you waked up?

"Answer. That we went out together, went through the door and went down the corridor together knocking on every door.

"Question. When you first woke up was the room full of smoke; could you tell where the smoke was coming from?

"Answer. No, sir.

"Question. Was the room completely full of smoke?

"Answer. Well —

"Question. Or quite full of smoke?

"Answer. Yes.

"Question. Did you see any fire?

"Answer. No, sir.

"Question. Were you yourself or any portion of your clothes burned?

"Answer. I was not myself. My jacket was [91] ruined. I don't frankly know if it was burned or waterlogged.

"Question. What happened to the jacket?

"Answer. It was — before I left — I was fully dressed except for my jacket, which indicates I must have taken my jacket off.

"Question. When you woke up you didn't have your jacket on?

"Answer. No, sir.

"Question. All right.

"Answer. Nor did I take it with me.

"Question. You didn't take it with you when you left there?

"Answer. No, sir.

"Question. In other words, you left it in the apartment?

"Answer. That's right.

"Question. Did you ever see it again?

"Answer. Yes; I saw it; I saw it sometime later.

"Question. Was it burned or scorched, or would you describe it?

"Answer. I am not sure; I know it was thoroughly [92] ruined.

"Question. But what was wrong with it; could you say that?

"Answer. Specifically, I can't.

"Question. Now, prior to leaving the apartment did you do anything else from the time you woke up and realized that the room was full of smoke until you went out of the door; did you do anything else?

"Answer. Not that I can recall.

"Question. You didn't attempt to determine then the cause of the fire?

"Answer. No.

"Question. Or where the fire was coming from, or the smoke?

"Answer. No, sir.

"Question. All right.

"Answer. I may have; I am not sure, but I may have opened a window; I am not sure.

"Question. All right. How did you get down the stairs or down to the ground level from Mrs. Hill's apartment?

"Answer. I honestly don't recollect; I remember [93] going out the door and she going down one side of the corridor and pounding on the doors and me the other and I honestly

don't recollect how we got down to the lobby.

"Question. Was Mrs. Hill burned in any manner that you could tell?

"Answer. Not to my knowledge.

"Question. How did you leave the scene of the fire once you did get to the ground floor?

"Answer. I don't remember.

"Question. Do you remember where you went?

"Answer. No, sir, I don't.

"Question. Do you remember where Mrs. Hill went or how she left?

"Answer. No, sir. No, sir, I don't.

"Question. Did you ever see Mrs. Hill again?

"Answer. No, sir.

"Question. When do you next remember being some place after this fire?

"Answer. At the airport, and I don't frankly remember where I flew.

"Question. How —

"Answer. (Continuing) I mean, whether I continued on business or came back to Dallas; I don't honestly know [94] which."

Skipping over to page 26, line 22 at the bottom.

"Question. All right. On the day of this fire had you been to a swimming party prior to going to the Red Coach Inn?

"Answer. I could very well have been; I will put it that way."

And the next page, partly down.

"Question. Do you remember meeting Mrs. Hill prior to going to the Red Coach Inn?

"Answer. I don't, but I could have.

"Question. Do you remember?

"Answer. Only in connection with the same party.

"Question. Is it possible that there was a party earlier in the afternoon and then you went to the Red Coach Inn?

"Answer. That is possible.

"Question. That you attended?

"Answer. That is possible."

On page 28 near the bottom:

"Question. Do you remember whether or not you [95] were smoking in Mrs. Hill's apartment?

"Answer. No, I don't.

"Question. Would it be reasonable to assume that you were or would you even be willing to make such an assumption?

"Answer. No, sir; I could have. I do smoke.

"Question. And you had been on this occasion?

"Answer. That day?

"Question. Yes.

"Answer. Presumably.

"Question. And in the Red Coach Inn?

"Answer. Yes, sir.

"Question. During the party?

"Answer. Yes.

"Question. But whether or not you actually had lighted a cigarette at Mrs. Hill's apartment, you could not say?

"Answer. I could not say.

"Question. And I believe you also would not be able to say whether or not Mrs. Hill was smoking on this occasion.

"Answer. I couldn't; no, sir.

"Question. And there was no one else in the [96] apartment at this time?

"Answer. That is correct, to my knowledge.

"Question. Were you well and healthy; was there anything wrong with your physical condition on this particular occasion?

"Answer. Not to my knowledge, no.

"Question. Do you have any idea or reason in your mind as to why you happened to go to sleep on this occasion?

"Answer. No, sir, except probably it had been a long day and I was probably darned tired.

"Question. All right. Were you yourself injured in any manner in this fire or in the process of getting out of the fire?

"Answer. No, sir."

MR. FITZGERALD: That is all I have to submit.

MR. INTRATER: If Your Honor please, I would just like to read a little bit of page 27. It starts on line 15.

"Question. The day before, do you remember how you occupied your time?

"Answer. No, sir.

"Question. On that day before?

"Answer. No, sir.

[97] "Question. On the Saturday that preceded this party at Red Coach Inn?

"Answer. On the Saturday, no, sir.

"Question. You do not?

"Answer. No, sir.

"Question. All right.

"Answer. That is just too long ago.

"Question. Do you remember the names of any other people who might have been in this party or might have been at the scene of the fire, other than you and Mrs. Hill?

"Answer. Absolutely not, sir."

* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,944

INSURANCE COMPANY OF NORTH AMERICA,

Appellant,

v.

KATHLEEN HILL,

Appellee.

**Appeal from the United States District Court
for the District of Columbia**

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ALBERT BRICK

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**United States Court of Appeals
for the District of Columbia Circuit**

FILED AUG 17 1967

Nathan J. Paulson
CLERK

(i)

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the sole question on appeal is as follows:

Where the trial court found as a fact that appellee was not negligently responsible for a fire started in her apartment by a guest, was such finding "clearly erroneous" so as to call for a reversal?

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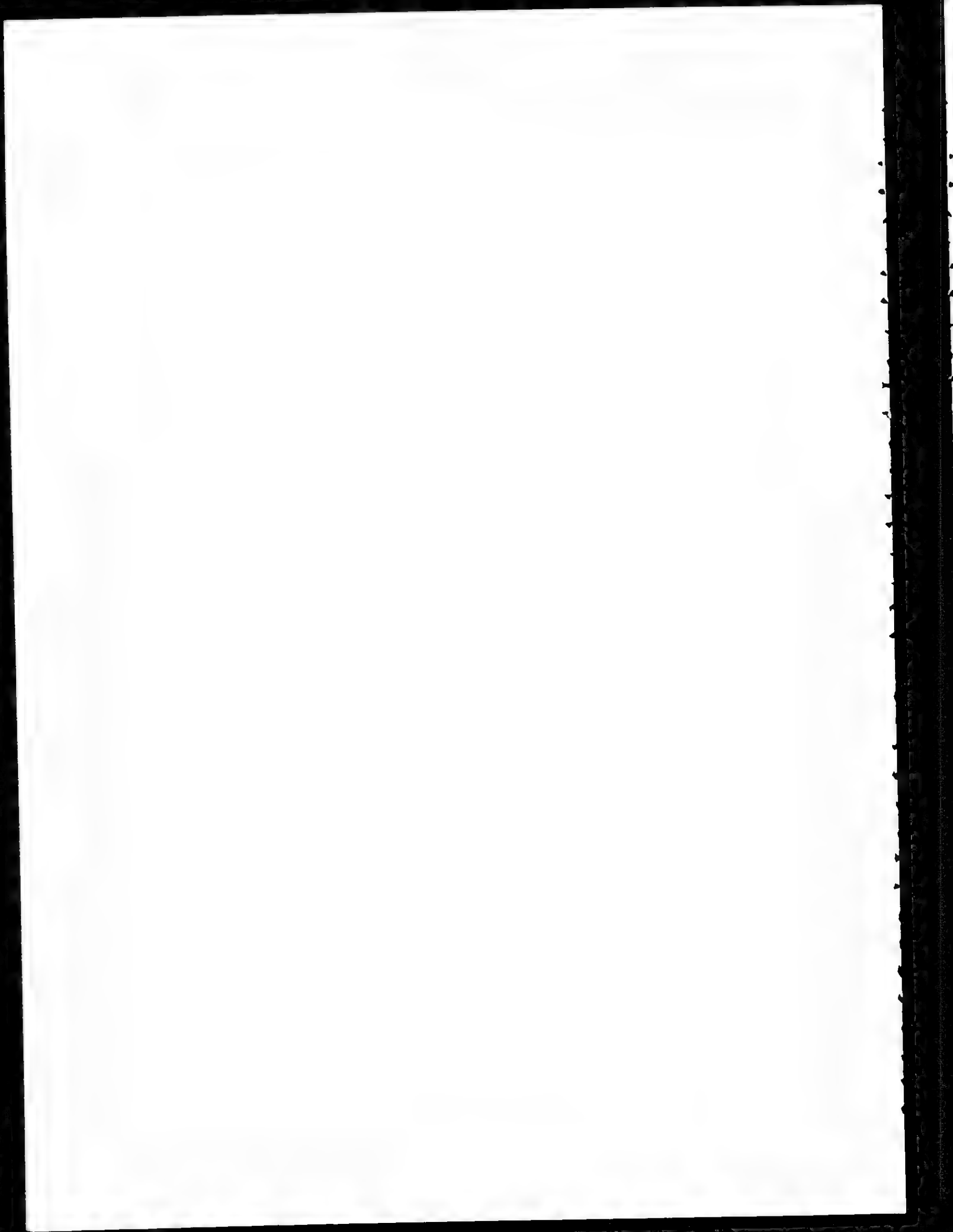
TABLE OF CASES AND AUTHORITIES

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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF CASE

Appellee was escorted home, from a buffet-cocktail party, by a gentleman she had met earlier, who also attended said party. They arrived at her apartment at approximately 2 A.M. and she invited him in (J.A. 10, 11, 12, 13, 14, 15). The gentleman indicated he was tired because he had been travelling all night and had not had any sleep (J.A. 14, 15, 30).

Appellee sat down in a chair, her guest, on the couch, and both apparently fell asleep (J.A. 15 and 16). They were awakened by smoke which had filled the apartment (J.A. 15, 16, 26). They then went out into the hallway to arouse the tenants in the other apartments (J.A. 16, 17, 27).

The evidence further showed that appellee never smoked cigarettes but that her guest was a smoker.

The case was tried without a jury, and the trial court found as a fact that appellee's guest had started the fire by a cigarette; that appellee was not negligent; and that appellant was therefore not entitled to a verdict.

SUMMARY OF ARGUMENT

The finding of the trial court, that appellee was not negligent, is a finding of fact, which, under Rule 52 of the Federal Rules of Civil Procedure, "shall not be set aside unless clearly erroneous." Appellant has made no such showing of a *clearly erroneous* finding.

ARGUMENT

In tort cases tried without a jury, the function of the trial court is twofold: (A) sitting as a judge, it determines the proper legal principles to be applied, and (B) sitting in place of a jury, it makes factual findings as to the negligence vel non of the defendant. As to this latter function — the finding of facts — the determination by the trial court is binding, unless "clearly erroneous." (See Rule 52, Federal Rules of Civil Procedure).

This Court has on many occasions recognized the above principles and refused to alter the findings of the trial judge, where there was no showing of clear error. (See *Glenn v. Kraft*, 82 U. S. App. D. C. 381, 164 F.2d 715; *Santucci v. Pignatello*, 88 U. S. App. D. C. 190, 188 F.2d 643; *Brandt v. Robertson*, 105 U. S. App. D. C. 255, 266 F.2d 456; *Glassie v. King*, 123 U. S. App. D. C. 369, 360 F.2d 503).

As to the question of what constitutes "clear error" which would justify an appellate court in reversing such a finding of fact, the United States Supreme Court has held that the fact that an appellate court might come to a different conclusion from that of the trial court is not a sufficient basis to declare that the decision of the lower court was "clearly erroneous." Thus, in *United States v. National Association of Real Estate Boards*, 339 U. S. 485, 495, 70 S. Ct. 711, 717, the Supreme Court held:

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent We are not given those choices, because our mandate is not to set aside findings of fact unless clearly erroneous."

See also *United States v. Yellow Cab Co.*, 338 U. S. 338, 42, 70 S. Ct. 177, 179, in which the court held that where the evidence might support several different conclusions, the choice as to which view to take is for the trial court, and its decision as to such choice is *not* "clear error."

In the instant case, appellee submits that not only was the decision of the lower court *not* clearly erroneous, but, that any *other* decision *would* have been clear error.

In essence, appellant is attempting to attach liability to appellee, because *some one else*, in no way acting as appellee's agent, apparently started a fire because of careless smoking. Such a decision would not only be erroneous, but it would be disruptive of our economy and society. In a Nation of approximately 200,000,000 people, where 49,000,000 adults are cigarette smokers,* no one would dare to associate with anyone else, if he were to be held legally responsible for the damage that the other might conceivably do as a result of smoking a cigarette.

In this case, appellant's charges of negligence were basically that, late at night, appellant invited into her apartment a person who had been drinking and who was a smoker. The trial court held that this conduct did not vary from that of the ordinarily prudent person and was not negligent. Appellee submits that this decision was eminently correct.

CONCLUSION

Appellee, therefore, prays that the judgment entered herein be affirmed.

Respectfully submitted,

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* Statistics obtained from National Clearing House for Smoking and Health, Public Health Service.

